

SUPREME COURT OF FLORIDA

GAILYN W. WHEELER,

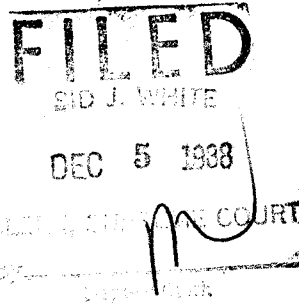
Petitioner,

vs.

CASE NO. 72,922

FINLEY CORBIN, as Mayor of  
Blountstown, a subdivision of  
the State of Florida, and  
R. W. DEASON, as Police Chief  
of the Blountstown Police  
Department,

Respondents.



ON REVIEW  
FROM THE DISTRICT COURT OF APPEAL,  
FIRST DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF

DANIEL, KOMAREK & MARTINEC  
Chartered

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ATTORNEYS FOR PETITIONER

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## PRELIMINARY STATEMENT

Petitioner was the Appellant/Plaintiff in the lower court and will be referred to as Petitioner. Respondents were the Appellees/Defendants in the lower court and will be referred to as Respondents. An amicus curiae brief was filed in this cause by the State of Florida Department of Highway Safety and Motor Vehicles, who will be referred to as the Department.

The following symbols will be used in this brief, followed by the appropriate page number(s):

RAB - Respondents' Answer Brief

ISSUE ON APPEAL

A GOVERNMENTAL AGENCY SHOULD BE LIABLE TO AN OWNER FOR LOSS OF USE DAMAGES AS A RESULT OF AN UNSUCCESSFUL FORFEITURE WHEN THE FORFEITURE IS HELD TO BE UNLAWFUL UPON APPELLATE REVIEW.

## SUMMARY OF ARGUMENT

An owner who successfully defends a forfeiture action should be entitled to recovery for loss of use of their property during the pendency of the forfeiture proceedings or until such time as the property is returned to the owner in the same or similar condition as the time of seizure.

The seizing agency should be liable to an owner for loss of use damages where the agency acts negligently. Moreover, the agency should be required to exercise care in determining whether the owner of property seized knew or should have known of illegal activity involving the seized property. Accordingly, the question certified should be answered in the affirmative.

## ARGUMENT

Respondents concede that a seizing agency is liable to an owner for loss of use of his property where the seizing agency acts without probable cause or in bad faith. (RAB:3-4). Respondents argue, however, that there should be no liability for loss of use where the seizing agency was negligent in determining whether the property in question should be seized. Similarly, the Department urges this Court to adopt the rationale espoused by the Court in Morton v. Gardner, 513 So.2d 725 (Fla. 3d DCA 1987). The Morton Court held that the owner's exclusive avenue of recovery is the forfeiture proceeding and further held that the owner was entitled only to the return of his property and no loss of use damages. Id. Respondents further characterize the wrongful deprivation of use of one's property by an unlawful forfeiture as analogous to an unlawful arrest.

Initially, the analogy made by Respondents, and somewhat consistent with the theme of the Department's amicus curiae brief, is tainted by distinctions reflecting the inappropriateness of denial of loss of use damages. Firstly, when property is seized, as in the instant case, there is no written complaint for seizure prior to the seizure. Furthermore, the owner has no remedy to obtain possession of his property until the Court determines whether forfeiture of the property is lawful. When an arrest is made, even unlawfully, there is at least a judicial determination of whether probable cause exists for the arrest and release on bond is determined at a prompt first appearance within twenty-four (24) hours of the arrest. Fla. R. Crim. P. 3.130(a). No such remedy or availability for release exists where a governmental agency seizes property.

Inasmuch as the standards for seizure of property and conditions of its release differ from the standards for arrest of a person and release pending ultimate determination of the criminal charges, so too should the standard for liability for loss of use of the property differ from the standard of liability for an unlawful arrest by a governmental agency. Petitioner submits that the seizing agency should be liable to an owner of property where the seizure and forfeiture is ultimately determined to be unlawful. Although Respondents attempt to distinguish between forfeiture and seizure, any such distinction is nebulous in that if the seizure is unlawful, the forfeiture is unlawful, and if the forfeiture is unlawful, the seizure is unlawful. In other words, either the owner should be or should not be deprived of the use of his property.

Respondents further argue that there should be no liability in the instant case due to Petitioner's failure to allege bad faith on behalf of the seizing agency. Petitioner suggests that logic dictates that the burden of proof should be upon the seizing agency to show that their actions did not fall below a reasonable standard of care where a loss occurs to a property owner as in the case at bar. The seizing agency is not in the position of a bailee as Respondents suggest. A bailor voluntarily leaves or entrusts his property to another in trust. Webster's New Collegiate Dictionary, 9th ed. (Merriam Webster, Inc., 1983).

In the instant case, Petitioner clearly did not voluntarily deliver or entrust her property to the seizing agency. Petitioner suggests that the seizing agency should have the burden of proof of showing that their actions were not negligent in order to avoid liability to the owner of property for loss

of use where a forfeiture is determined unlawful. Moreover, the seizing agency should be required to show that effort was made in a reasonable and prudent manner to determine whether the owner of the property had knowledge of any illegal activity which prompted the seizure and forfeiture proceeding. Falling short of showing the exercise of reasonable standard of care, the seizing agency should be liable to an owner where loss of use damages are proven. Without allowing loss of use damages as suggested by Petitioner, there is absolutely no restraint upon governmental authority for recklessly seizing property. Moreover, there would be nothing to deter wrongful seizure and forfeiture of property, nor could a seizing agency be held accountable for actions that wrongfully harmed another.

Accordingly, the certified question should be answered in the affirmative.

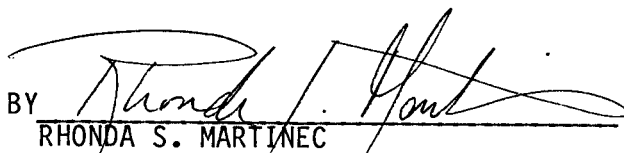
CONCLUSION

The question certified by the District Court of Appeal, First District,  
should be answered in the affirmative.

Respectfully submitted,

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BY



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been delivered by mail to Judson M. Chapman, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Neil Kirkman Building, A432, Tallahassee, Florida 32399-0504, and H. Hentz McClellan, Attorney for Respondents, 119 River Street, Blountstown, Florida 32424, on this 2d day of December, 1988.

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